Supreme Court U.S.
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No. 02-1504

In the
# Supreme Court of the United States

JOSEPH F. KWOK,

*Petitioner,*

vs.

NEW YORK CITY TRANSIT AUTHORITY, TRANSPORT WORKERS' UNION, Local 100/AFL-CIO, and WILLIE JAMES, President of Local 100/TWU,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENT NEW YORK CITY TRANSIT AUTHORITY'S BRIEF IN OPPOSITION

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Respondent New York City Transit Authority requests that this Court deny the petition for a writ of certiorari filed by Joseph F. Kwok, a former employee of the Transit Authority's, seeking review of a summary order of the Court of Appeals for the Second Circuit that affirmed the judgment of the United States District Court for the Southern District of New York. The district court had granted summary judgment dismissing Mr. Kwok's complaint as against the Transit Authority on the grounds that he had "knowingly and voluntarily waived any claims he had against" the Transit Authority. Pet. 13a.

## Counter-Statement of the Case

Mr. Kwok had been a subway "train operator" employed by the Transit Authority. As such, he was required, by regulations promulgated by the Untied States Department of Transportation, to be tested for drugs. That test required him to provide a urine specimen of at least 45 ml. (approximately 1.5 oz.) within a three-hour period. Under the federal regulations, a tested employee's failure to provide that minimum amount of urine — unless the failure was deemed by a "medical review officer" to have been a result of a medical condition — would cause the employee to be designated a "refusal" for test purposes. Mr. Kwok was tested (on October 15, 1997), failed to provide a sufficient sample of urine, did not submit any evidence of a medical condition preventing sufficient urination, and (on October 23, 1997) was ultimately deemed by the Transit Authority's medical review officer to be a "refusal."

A Transit Authority employee's being designated as a test "refusal" has several consequences. Under the regulations, the Transit Authority "shall require that [the] employee cease performing a safety-sensitive function" (49 C.F.R. § 653.35(a)) — in this instance, operating a subway train — and the employee may not return to that kind of work until cleared

to do so by a "substance abuse professional" (49 C.F.R. §§ 653.49, 653.63). Under the Transit Authority's own rules, a "refusal" is also considered a kind of insubordination, that is, a disciplinary violation, for which dismissal from employment may be sought; and the Transit Authority sought Mr. Kwok's dismissal. Because Mr. Kwok challenged that discipline, the matter of the appropriate discipline was grieved under the grievance-to-arbitration procedures negotiated into the collective bargaining agreement between the Transit Authority and the labor union representing Mr. Kwok, Local 100 of the Transport Workers Union ("TWU"); the final step of those procedures, if the TWU requests it, is arbitration.

In Mr. Kwok's case, the TWU requested arbitration and a hearing was scheduled. The Transit Authority, in an effort to settle the matter (and so avoid the costs and uncertainties of the arbitration process), proposed to the TWU that the grievance be resolved by Mr. Kwok's agreeing to participate in an Employee Assistance Program and to accept a demotion to a non-safety sensitive position; in return, Mr. Kwok would waive or release all claims he might otherwise have against the Transit Authority related to this drug testing issue (and stay employed, thus avoiding possible dismissal if the arbitrator were to rule against him). The Transit Authority prepared, and gave to the TWU, a stipulation to that effect. The TWU, by one of its field representatives and one of its attorneys, explained the stipulation to Mr. Kwok shortly before the arbitration was to begin, and he signed it on November 18, 1997.

There is no dispute that the Transit Authority lived up to its obligations set out in the stipulation. Mr. Kwok, however, after participating in an Employee Assistance Program and returning to work for the Transit Authority (in a demoted, non-safety sensitive, position), in 1999 sued the Transit Authority for supposedly violating his Fourteenth Amendment constitutional rights to due process and equal protection

(utilizing the vehicle of 42 U.S.C. § 1983) in the way the Transit Authority handled his drug test and demoted him. In so doing, Mr. Kwok violated his agreement in the stipulation that he was waiving or releasing all claims he might have had to bring such a suit.

In a decision (not officially reported) dated July 20, 2001, the district court granted summary judgment dismissing Mr. Kwok's claims against the Transit Authority.[1] That court, reviewing the deposition testimony of Mr. Kwok and other evidence, concluded that his signed waiver of his rights to bring this lawsuit against the Transit Authority — in the "totality of the circumstances" — was "knowing and voluntary" (Pet. 12a). Dismissal of Mr. Kwok's claims was therefore necessary.

The Court of Appeals for the Second Circuit, in an unreported summary order, affirmed "substantially for the reasons stated in the District Court's thorough Opinion and Order of July 20, 2001." Pet. 2a.

In his petition for a writ of certiorari, Mr. Kwok argues that this Court should resolve what he perceives to be a conflict among the Courts of Appeals about the proper standard that a court should use to determine whether an individual's waiver of constitutional (or federal statutory) rights is knowing and voluntary, and thus enforceable. In the Second Circuit, as illustrated by the district court's decision in this case and, for instance, in *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989), the "totality of the circumstances" standard has been used. *See also, e.g., Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 12 (1st Cir. 1997). Other courts have used an "ordinary contract principles" standard. *See, e.g., O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 (4th Cir.),

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[1] Mr. Kwok had also asserted claims against his union, that is, the TWU, and the district court dismissed them (on different grounds).

*cert. denied*, 502 U.S. 859 (1991); *Runyon v. National Cash Register Corp.*, 787 F.2d 1039, 1044 n.10 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986); *Todd v. Blue Ridge Legal Services, Inc.*, 175 F. Supp.2d 857, 862 (W.D. Va. 2001). Mr. Kwok seeks to ask this Court to decide that the "ordinary contract principles" standard (which he thinks Congress, through the Older Workers Benefit Protection Act amendment, codified at 29 U.S.C. § 626(f), to the Age Discrimination in Employment Act, came to impose for assessing waivers of rights under the latter Act ("ADEA")) should be applied by the judiciary, instead of the "totality of the circumstances" standard, to assess the validity of individual waivers of constitutional rights where, as here, Congress has specified no specific standard.

This, *Kwok*, case, however, is not a suitable case to resolve the difference of views among the Courts of Appeals on this subject, and the petition should be denied.

## REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari in this case should be denied because the difference in standards for reviewing waivers of federal constitutional or statutory rights to determine whether the waivers were knowing and voluntary and thus valid and enforceable — that is, the "totality of the circumstances" standard versus the "ordinary contract principles" standard — would make no difference for the outcome of this case. That is because the "totality of the circumstances" standard for reviewing the validity of such waivers has been generally understood, by courts on both sides of the question, to be the "more stringent" standard for approving the validity or enforceability of a particular waiver. *See, e.g., O'Shea*, 930 F.2d at 361-62 (while choosing to use "ordinary contract principles" standard, court notes that the "totality of the circumstances" standard is "more stringent"); *Bormann*, 875 F.2d at 403 (declining to utilize "ordinary contract principles" test and choosing "totality of the circumstances"

standard, court notes that the latter is "apparently more stringent"). *See also Nicholas v. NYNEX*, 929 F. Supp. 727, 730 (S.D.N.Y. 1996) (The "totality of the circumstances" standard "is somewhat more stringent than the analysis called for under ordinary contract law, for determining whether a release of discrimination claims was executed knowingly and voluntarily.").

In other words, it is harder for a court to uphold a waiver under the "totality of the circumstances" standard than under the "ordinary contract principles" standard. And thus, where (as here) the district court concluded that the waiver that the petitioner, Mr. Kwok, signed should be upheld and enforced, under the "totality of the circumstances" standard, *a fortiori* the waiver would have been upheld under the "ordinary contract principles" standard. That means that, even if this Court were to grant Mr. Kwok's petition, and go on to authorize the "ordinary contract principles" standard, Mr. Kwok's waiver would have to be upheld. He would still lose his case, as a matter of law, and that would effectively make this petition a request for an advisory opinion from this Court, useful perhaps for other cases but not for this one. The petition should, accordingly be denied.

Petitioner is also under a misimpression about the standard that Congress wished utilized for assessing the enforceability or validity of waivers under the ADEA. While there had been some variation of views about the matter, Congress, by statute, resolved the question legislatively, effective October 16, 1990, in favor of the "totality of the circumstances" standard. *See, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1465 (4th Cir. 1996) ("In enacting OWBPA [i.e., the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)] Congress essentially codified the 'totality of the circumstances' test, rejecting application of ordinary state law contract principles in determining whether a release agreement [that waived ADEA claims] is valid.") Petitioner therefore is

mistaken in his premise that this Court, were it to grant his petition and address the merits of his argument, would adopt Congress's approach to waivers of ADEA claims and so would reject the "totality of the circumstances" standard and adopt the "contract principles" one; the opposite, rather, would be true, and that would doom his chance for success in this litigation. His petition, for this reason as well, should be denied.

## Conclusion

The petition, to the extent addressed to claims against the New York City Transit Authority, should be denied.

Dated: June 3, 2003

Respectfully submitted,

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